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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1587

NATHAN STEIN,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, Nathan Stein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this cause on the 9th day of February, 1971.

## A. OPINION BELOW

The opinion of the Court of Appeals is not yet reported and is printed as Appendix A, infra.

## B. JURISDICTION

The judgment of the Court of Appeals (Appendix B, infra) was entered on the 9th day of February, 1971. A timely petition for rehearing was denied on March 2nd, 1971 (Appendix C, infra). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## C. QUESTIONS PRESENTED

1. Whether it was prejudicial error in overruling the motions and judgment of acquittal when there was insufficient evidence to sustain a conviction?

2. Can a criminal conviction record in the testimony of a witness whose testimony related to conversations with the petitioner which were neither admissible as admissions or as part of the res gestae and which are remote?

3. Whether the Trial Court erred in restricting the cross-examination of Government witnesses in matters relating to the credibility of their testimony?

4. (a) Whether it was reversible error in admitting into evidence, over objection, computations and summaries prepared by the Government which did not accurately reflect income?

(b) Whether it was reversible error in admitting into evidence, over objection, computations and summaries prepared by the Government which contained omissions, interpretations, discrepancies with the record, incorrect assumptions, matters outside the record and conclusionary captions?

5. Whether the Government's known use of tainted testimony vitiated the entire trial and resulting conviction?

6. Whether the Court below overlooked, misapprehended or misapplied the law applicable to the instructions in this cause wherein the Court below upheld the actions of the Trial Court in instructing the jury that capital losses incurred during the year must be added to an increase in net worth, which was a disputed fact, and which required the jury to add a substantial erroneous amount to the 1963 net worth computation of corrected income?

The foregoing questions are discussed in this petition as reasons for granting the Writ.

Question 7 which follows is reserved for argument on the merits in connection with related questions presented.

7. Whether the Court's below reliance in the cases it cited that the Government's bank deposit proof need not be corroborated is misplaced?

## D. CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The Fifth Amendment, Constitution of the United States, provides in pertinent part: "No person shall be * * * deprived of life, liberty or property * * *." Section 7201 of Title 26 U.S.C. provides as follows: "Any person who wilfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined no more than $10,000, or imprisoned not more than 5 years or both together with the costs of prosecution." Title 26, United States Code, Section 7201.

## E. SUMMARY STATEMENT OF MATTERS INVOLVED

On February 23, 1968, the defendant was indicted in two counts for attempting to evade and defeat income tax due and owing for the calendar years 1962 and 1963

respectively by filng and causing to be filed with the District Director of Internal Revenue for the Internal Revenue District of Indianapolis, at Indianapolis, Indiana, a false and fraudulent joint income tax return in violation of Section 7201 of the Internal Revenue Code, Title 26 United States Code, Section 7201.

Trial by jury was commenced in the United States District Court for the Southern District of Indiana on July 7, 1969, and was concluded on July 11, 1969. The Government relied entirely upon the bank deposits method of proof. The jury returned a verdict of not guilty as to Count I for the year 1962 and guilty as to Count II for the year 1963.

The defendant filed motions for judgment of acquittal at the close of the evidence offered by the Government, at the close of all the evidence and again within seven days after the discharge of the jury. Each of the motions was based on the ground that the evidence was insufficient to sustain a conviction for the offense or offenses. Each of the motions for judgment of acquittal was overruled.

On November 14, 1969, the Court sentenced the defendant to one year imprisonment and imposed a fine in the amount of $2,500.00. A timely Notice of Appeal was filed on November 24, 1969.

The Court of Appeals affirmed the conviction and denied rehearing.

## F. REASONS FOR GRANTING THE WRIT

### 1. THE COURT ERRED IN OVERRULING THE MOTIONS FOR JUDGMENT OF ACQUITTAL WHEN THERE WAS INSUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION

The essential elements which the Government was required to prove beyond a reasonable doubt were:

1. That a tax was due and owing from the defendant to the Government for each of the years charged;
2. That the defendant attempted to evade and defeat payment of that tax;
3. That his attempt to so evade was willful. *United States v. England* (C.A. 7, 1965), 347 F.2d 425.

The evidence was not sufficient to sustain a conviction because a reasonable mind could not have fairly concluded guilt beyond a reasonable doubt. The motions for judgment of acquittal, either at the close of all the evidence or after the jury was discharged, should have been sustained. *United States v. Williams* (C.A. 7, 1963), 311 F.2d 721; *Curley v. United States* (C.A.D.C., 1947), 160 F.2d 229.

**A. There was not evidence beyond a reasonable doubt with respect to unreported income for the year 1963.**

The Government relied entirely upon the bank deposits method of computation in arriving at unreported income. The computation was based upon the assumption that all of the deposits during the year, with the exception of those the agents concluded were non-income, constituted taxable income. The total deposits of taxable income, as concluded by the agents, was then used as the base upon which the agents arrived at the "corrected taxable income" which when compared with that reported on the return resulted in an understatement (Government Exhibit 44, A-636 to 638).

The manner in which the Government set up its computation resulted in a showing of understatement in excess of $3,000 higher than had the gross receipts shown on Government's Exhibit 44 been compared with the gross receipts shown on the return (A-269-79).

The assumption that the gross receipts figure shown on the government's computation was made up entirely of taxable income was hardly free from reasonable doubt. It was

reached by the deduction from total deposits, amounts which Special Agent Shaw had concluded to be non-income deposits. Shaw's conclusion was made from an examination of the deposit slips and the questioning of Mr. Stein (A-129). The actual checks which were deposited were not available (A-175, 186, 189). Mr. Stein was required to pick out non-income amounts merely by looking at amounts deposited in 1963 and was guessing (A-172, 173). Mr. Shaw admitted that there could have been more non-income deposits (A-175). No non-income items were deducted from cash deposits (A-176).

The non-income deposits deducted as payments from Francis I. duPont and Company may not have constituted the entire amount (A-93, 94). The figure deducted as repayment of loans from Albert Profeta was not complete (A-97, 101). Witnesses testified as to non-income payments to Mr. Stein which had not been deducted by the Government (A-286 to 290, 290 to 293, 299 to 301, 305 to 325, 378 to 388). Mr. Stein testified that there were even more (A-388). The basis of the Government's bank deposits computation—that all non-income deposits had been excluded in reaching the ultimate conclusion of correct taxable income—was not free from reasonable doubt.

There was no direct evidence of any specific item of unreported income. There was no corroboration of the Government's indirect, circumstantial evidence, method of proof.

The defendant's evidence showed that a computation of his 1963 income by the net worth and expenditures method not only failed to corroborate the Government's bank deposits method, but showed a completely contrary result (Defendant's Exhibit NN, A-639 to 641). The corrected taxable income shown by increase in net worth and expenditures was merely $2,534.50 (A-641). An additional asset of $1,500.00 for prepaid insurance added to that amount, made the corrected income $4,034.50 (A-567, 568). The Government had deducted $4,655.00 in bookkeeping errors as a non-fraud item (Government Exhibit 44, A-157, 158).

The majority of the figures shown on the net worth computation came from Special Agent Shaw as the result of his investigation in attempting to establish a net worth corroboration (A-335 to 361, 363 to 365). The remaining figures primarily constituted liabilities in the form of funds held in trust and accounts payable. None of these figures were disputed by any evidence offered by the Government.

With the exception of the possibility of additional non-income deposits, Mr. Stein's testimony explains why there was a discrepancy between reported and corrected income when using the bank deposits method and none when using the net worth method. All receipts were put in the bank. His closing inventory was almost entirely accounts receivable. By putting accounts receivable into closing inventory, he reduced his cost of goods sold and increased his gross profit. The gross profit figure was thus the same as if the amount entered as closing inventory had been entered as sales (A-271, 272). Because the gross profit figure was increased by that amount, resulting in tax being computed on that amount, he did not enter these amounts as sales when the receivables were collected in the next year, although they were deposited in the bank. He felt that to do so would result in these dollars being taxed twice; once in the year in which they had reduced cost of sales and increased profit and again in the next year when they were collected. The $9,286.84 ending inventory in 1962 which was accounts receivable were, therefore, not entered as sales when collected in 1963 even though deposited in 1963. Thus there was a discrepancy in the amount between the 1963 deposits and the 1963 sales.

Mr. Stein's 1963 accounts receivable which went into ending inventory were based on the amounts receivable figure as of December 24, 1963. These amounted to $14,944.89 and by reducing cost of sales, they increased the profit by that same amount; having the same effect as had they been put in sales. These receivables were collected by December 31, 1963, and the money was deposited in

the bank. They were left in ending inventory, however, because some ending inventory had to be shown. The money was not his because it represented sales of products for which he had not paid. Such resulted in an additional discrepancy between bank deposits and sales for 1963. This 1963 ending inventory figure corresponds to the deposits between December 24 and December 31, 1963 (Government Exhibits 9 and 38).

Because of certain business conditions in 1963, Mr. Stein withheld payments to his suppliers which resulted in accounts payable at the end of 1963 in the amount of $23,010.00. The proceeds from the sales of these products which had not been paid for went into the bank in 1963. Had the products been paid for Mr. Stein's purchases would have been increased by that amount and the bank deposits computation would have shown $23,000.00 less.

Thus, the discrepancy between the bank deposits method and the net worth method at arriving at income can be shown and there was certainly a reasonable doubt concerning the Government's bank deposits computation.

To justify a conviction there must be proof beyond a reasonable doubt that the defendant evaded income tax. Because there was no direct proof that the defendant received income which he did not report, the validity of the conviction must be tested by determining whether the circumstantial evidence was such as to exclude every reasonable hypothesis except that of guilt since evidence of mere probability of guilt is not sufficient. *United States v. Fenwick* (C.A. 7, 1949), 177 F.2d 488; *Elwert v. United States* (C.A. 9, 1956), 231 F.2d 928. Here, the Government's circumstantial evidence of unreported income could not have led to that conclusion with reasonable certainty beyond mere suspicion. It had to be not only consistent with guilt but inconsistent with every reasonable hypothesis of innocence. *Cohen v. United States* (C.A. 5, 1966), 363 F.2d 321. The evidence was not sufficient to exclude every hypothesis other than that of guilt and was as consistent

with that of innocence as with that of guilt. *Tri-Angle Club, Inc. v. United States* (C.A. 8, 1959), 265 F.2d 829; *LaConte v. United States* (C.A. 10, 1964), 330 F.2d 700; *Barnes v. United States* (C.A. 8, 1965), 341 F.2d 189.

As this Court stated in *United States v. Standard Oil Co.* (1963), 316 F.2d 884 at 899:

> The government failed to produce sufficient circumstantial evidence to "exclude every reasonable hypothesis except that of guilt." United States v. Fenwick, 7 Cir., 177 F.2d 488, 490.

To put it another way, while the chain of circumstances in the bank deposits computation may have been consistent with guilt, it was not inconsistent with innocence and it is insufficient to support a conviction. *Tyler v. United States* (C.A. 10, 1963), 323 F.2d 711; *Barnes v. United States,* supra, 340 F.2d 189; *LaConte v. United States,* supra, 330 F.2d 700.

The motion for judgment of acquittal should have been sustained and the conviction should be reversed.

**B. There was not evidence beyond a reasonable doubt that there was a willful attempt with specific intent to defeat and evade income taxes.**

Even if it could be assumed that the Government proved beyond a reasonable doubt by its bank deposits computation that there was unreported income in 1963, there was no evidence beyond a reasonable doubt of a willful attempt, with specific intent to evade and defeat income taxes. Willfulness is a necessary element for conviction of income tax evasion which must be proved by independent evidence and which cannot be inferred from the mere understatement of income. *Holland v. United States* (1954), 348 U.S. 121; *United States v. Halovachka* (C.A. 7, 1963), 314 F.2d 345, 357; *United States v. Sams* (C.A. 3, 1965), 340 F.2d 1014.

The required element of willfulness which must be proved by independent evidence beyond a reasonable doubt

is a state of mind in which the taxpayer is fully aware of a tax obligation which he seeks to conceal and has a specific intent to conceal. *United States v. Peterson* (C.A. 7, 1964), 338 F.2d 595. It means more than intentionally or voluntarily and requires an evil motive or bad purpose. *United States v. Phillips* (C.A. 7, 1955), 217 F.2d 435. A misconception of the effect of putting accounts receivable in ending inventory would not constitute fraud. Not only was there an absence of common evidence of fraud, but the contrary was shown. He had no sources of income other than that shown on the return (A-165, 166, 191). He had no bank accounts other than those he revealed to the agents (A-178, 179). He had no hidden accounts or accounts in fictitious names (A-178). There was no concealment of assets or income. It was deposited in the bank where it could be easily found by the Internal Revenue Agents (A-178, 179). There were no fictitious purchases or double set of books or destruction of records. None of illustrations set forth in *Spies v. United States,* 317 U.S. 492 were present.

On the contrary, Mr. Stein cooperated completely with the agents. He voluntarily answered questions during numerous interviews and gave them everything in the way of books and records that they asked for. There was no attempt to mislead the agents and he did not seek counsel. The 1963 tax return was signed after Mr. Stein had been told by the revenue agent that he was under investigation. Where taxpayer makes no attempt to conceal his activities and makes every effort to facilitate the agents in ascertaining the facts, there is a presumption that there was not a willfully attempted evasion and the presumption must be repelled by clear and convincing evidence in order to authorize a conviction. *Berkovitz v. United States* (C.A. 5, 1954), 213 F.2d 468. The burden was on the Government to prove beyond a reasonable doubt that the defendant willfully and knowingly attempted to defeat taxes as charged in the indictment and the burden never shifted. *United States v. Indian Trailer Corp.* (C.A. 7, 1955), 226 F.2d 595.

The only evidence which the trial court considered as going to the issue of willfulness was the testimony of Mr. Stein's former employee, Gerald Waterman (A-282). Mr. Waterman testified concerning a conversation he had with Mr. Stein in Elwood, Indiana, in the early spring, March or April, of 1962. He stated that Mr. Stein said he would not hesitate to cheat the Government and file a fraudulent tax return. This conversation according to Mr. Waterman, took place at least two years before the 1963 tax return was signed. Waterman's testimony was inconsistent with the sworn statement he had given the Internal Revenue agents. The statement did not mention any conversation in Elwood, Indiana, although it referred to other similar conversations with Mr. Stein in the presence of Mr. Fivel and Mr. O'Koon. Both Fivel and O'Koon denied the existence of the conversations to the Internal Revenue agents and on the witness stand. Mr. Waterman was also shown to have sued Mr. Stein, to have held pay checks from Mr. Stein for long periods and then having them certified, and to have applied for the 10% reward from the Internal Revenue Service in connection with Mr. Stein's tax case. Mr. Waterman's testimony could not have proved willfulness, as it is required to be proved, beyond a reasonable doubt.

The jury found the defendant not guilty as to 1962. There was no more evidence of willful intent for 1963 than for 1962. What evidence there was by Mr. Waterman's testimony was insufficient. It did not prove beyond a reasonable doubt the specific intent to willfully attempt to evade and defeat taxes due and owing for the year 1963.

The motion for judgment of acquittal should have been sustained and the conviction should be reversed.

### C. There was no evidence that the income tax return was filed with the District Director of Internal Revenue for the Internal Revenue District of Indiana at Indianapolis, Indiana.

Count II of the indictment charged that on or about April 15, 1964, the defendant willfully and knowingly

attempted to evade and defeat income tax due and owing for the year 1963, "by filing and causing to be filed with the District Director of Internal Revenue for the Internal Revenue District of Indiana at Indianapolis, Indiana, in the Southern District of Indiana, a false and fraudulent joint income tax return."

There was no evidence that on or about April 15, 1964, or any other date, the defendant filed or caused to be filed a tax return with the District Director of Internal Revenue for the Internal Revenue District of Indiana at Indianapolis, Indiana, or any other place.

Government's Exhibit 3 was offered and received in evidence as a certified copy of the tax return for Nathan and Selma Stein for the year 1963 (A-25). At no place does it show on its face where it was filed or when it was filed. (Government Exhibit 3 appears in the Supplemental Appendix herein.) Revenue Agent Mehrlich was unable to say when it was filed (A-48). The Government offered no testimony concerning the filing of the return.

The indictment charged the filing of the return as the attempt to evade and defeat taxes as well as for the purpose of establishing venue at Indianapolis, in the Southern District of Indiana. Thus, the Government failed to prove venue. Such was raised in defendant's motion for judgment of acquittal at the close of all the evidence and in the renewed motion for judgment of acquittal after the jury had been discharged. Both motions were overruled. Such was error (A-609).

Where an indictment charges the fraudulent preparation of a return in one district and the filing in another, venue can be in either district. *Kowalsky v. United States* (C.A. 5, 1961), 290 F.2d 161. Where the charge is confined to an attempt to evade tax by filing a fraudulent return, the offense is committed where the return is filed. *Beaty v. United States* (C.A. 4, 1954), 213 F.2d 712. Filing is not complete until the return is delivered and received. *United States v. Lombardo*, 241 U.S. 73.

The lack of proof goes further than the question of venue, however. The attempt to evade and defeat by the filing of the tax return was an essential element of the offense. No citations of authority are necessary to show that every essential element must be proved beyond a reasonable doubt.

### D. There was no evidence of an additional tax due and owing.

Another essential element of the charge in Count II of the indictment was that a tax was due from the defendant to the Government for the year 1963. *United States v. England* (C.A. 7, 1965), 347 F.2d 425. To establish its case, it was necessary for the Government to prove, not only a willful attempt to defraud but also that a tax in addition to what the defendant had already paid remained due and owing. *United States v. Schenck* (C.A. 2, 1942), 126 F.2d 702. The attempt must be to evade a tax which is due. *United States v. Moody* (C.A. 6, 1964), 339 F.2d 161. Before it can be determined whether a tax is due and owing, it is necessary to show how much tax was paid. This was not shown by any evidence.

Thus, an essential element was completely lacking in proof and the motion for judgment of acquittal should have been sustained.

## 2. THE COURT ERRED IN OVERRULING THE MOTION TO STRIKE THE TESTIMONY OF GERALD WATERMAN CONCERNING CONVERSATIONS WITH THE DEFENDANT WHICH WERE NOT ADMISSIBLE AS ADMISSIONS NOR AS PART OF THE RES GESTAE AND WHICH WERE TOO REMOTE

Gerald Waterman, a former employee of the Ideal Meat Company, testified that in the "early spring—March or April of 1962" he had a conversation with the defendant in a restaurant in Elwood, Indiana. He stated that Mr. Stein had called his stockbroker three times during that day

and had said his earnings were good. Mr. Waterman testified that he asked Mr. Stein that if his earnings from the stock marked, the Ideal Meat Company and apartment rentals gross so much, because of the tax situation he may be paying most of it to Uncle Sam. Mr. Waterman testified that Mr. Stein replied that his income was such that he had no hesitancy, with the assistance of his accountant and his attorneys, of cheating the Government as well as he would cheat anybody else including his help and his customers; that if he didn't cheat them and have that attitude, they would cheat him; and that he would have no hesitancy in submitting a fradulent tax return to the Government if it benefited him (A-206 to 209).

Immediately after the testimony of Mr. Waterman, the defendant moved it be stricken on the ground that since the conversation took place prior to either of the offenses charged, Mr. Stein's utterances could not be considered as admissions and that they were too remote in time to be considered res gestae and were, therefore, irrelevant and immaterial and inadmissible (A-221). The Court held that it was not an admission of a past act but was a statement of what he would or might do in the future and that it was not too remote. The defendant's motion was overruled (A-224).

The conversation with Mr. Stein, to which Mr. Waterman testified, occurred in the early spring—March or April of 1962 (A-206). The indictment herein charged an offense on April 15, 1963, in Count I and on April 15, 1964, in Count II. The conversation took place more than a year prior to the offense charged in Count I and more than two years prior to the offense charged in Count II.

Declarations made at the time an offense is being committed or as part of the offense are usually considered part of the res gestae and are admissible to show knowledge and intent. *Warszower v. United States,* 312 U.S. 342; *United States v. Copeland* (C.A. 4, 1961), 295 F.2d 635. They must, however, not be remote. *Weiss v. United States,* 122

F.2d 675. A declaration occurring two years before the commission of the offense charged is too remote to be relevant on the issue of intent. *Boyer v. United States* (C.A. D.C., 1942), 132 F.2d 12. The statute, upon which the indictment herein was based, does not define a continuing offense which can be completed prior to the date on which the taxpayer is required to file his return. *United States v. Johnson* (C.A. 7), 123 F.2d 111, reversed on other grounds 319 U.S. 503. The offense is complete only when the manner of consummation of the attempt—here the filing of a false and fraudulent return—is employed. *Guzik v. United States* (C.A. 7), 54 F.2d 618. The declarations were, therefore, too remote from the time of the commission of the offense to be part of the res gestae and the testimony should have been stricken.

### 3. THE COURT ERRED IN RESTRICTING THE CROSS-EXAMINATION OF GOVERNMENT WITNESSES IN MATTERS RELATING TO THE CREDIBILITY OF THEIR TESTIMONY AND IN MATTERS WHICH WERE MATERIAL TO A THEORY OF THE DEFENSE

The Government's entire case with respect to showing unreported income was based on bank deposits; an indirect method of proof completely circumstantial in nature. Ordinarily, such methods of proof are corroborated by other methods. Here, no attempt at corroboration was made during the trial although such had been made during the investigation. During the cross-examination of Special Agent Shaw, the defendant was prevented on two occasions from bringing out the Government's attempt to corroborate its bank deposits computation by the net worth method (A-188) and from showing that the net worth method was more commonly used than the bank deposits method (A-189). The defense was also prevented from bringing out the Government's net worth computation during the cross-examination of Revenue Agent Stanley (A-267). The questions on cross-examination went to the credibility of the Government's bank deposits computation. Further

attempts at cross-examination as to the credibility of the bank deposits computation were blocked during the cross-examination of Special Agent Shaw (A-179) and Revenue Agent Stanley (A-266) when the defendant attempted to show that a determination of taxable income by the bank deposits method would not be a proper way for a person to report his income on his tax return, and that the Government's use of a bank deposits computation based inferences upon other inferences (A-194).

During the cross-examination of Gerald Waterman, the defendant had brought out the fact that the specific Elwood, Indiana conversation with Mr. Stein to which he had testified on direct had not been mentioned in his signed statements given to the Internal Revenue Agents and that at all the conversations he had referred to in his signed statement, Mr. Fivel and Mr. O'Koon had been present. Mr. Waterman was then asked if he had just thought of the Elwood, Indiana conversation since signing the statement, and he said he had known it right along. When asked why that conversation had not been included in his statement, he said that they did not ask him and he did not volunteer. The defendant then attempted to show that in Mr. Waterman's eight-page statement he had talked about a lot of conversations and was cut off (A-213 to 215). The attack on the credibility of Mr. Waterman's testimony, based on his prior inconsistent statement was important to the defense.

Wide latitude in cross-examination, particularly when it goes to the credibility of evidence, should always be afforded. *United States v. Allegretti* (C.A. 7, 1964), 340 F.2d 254, certiorari denied 381 U.S. 956; *Singleton v. United States* (C.A. 9, 1967), 381 F.2d 1; *Beatty v. United States* (C.A. 9, 1967), 377 F.2d 181.

Among the theories of the defense were the facts that Mr. Stein deposited all of his receipts in the disclosed bank accounts, that he cooperated fully with the investigating agents and that any discrepancy between his reported

sales and his bank deposits was the result of his method of treating accounts payable and receivable. Such went squarely to the issues of intent and willful attempt to evade and defeat his income tax. During the cross-examination of Special Agent Shaw, the defendant was prevented from bringing out the fact that in most cases of tax evasion the taxpayer does not deposit his income in the bank where the Internal Revenue Agents can find it (A-177). Further, the defendant was prevented in the cross-examination of Mr. Shaw from showing that tax evasion cases are made stronger by the taxpayer's cooperation than when cooperation is refused (A-180). During the cross-examination of Agent Stanley, the defendant was prevented from ascertaining whether Mr. Stein's reporting income on an accrual rather than a cash basis would have had an effect on any discrepancy between his reported income and his bank deposits (A-275, 276).

The testimony sought was important to the question of intent. Where intent is an ingredient of the offense, all circumstances which throw light on the subject should be received in evidence. Defendant had a right to overcome the evidence against him. *United States v. Bocur* (C.A. 7, 1952), 194 F.2d 297; *Norcott v. United States* (C.A. 7, 1933), 65 F.2d 913, 919.

**4. THE COURT ERRED IN ADMITTING INTO EVIDENCE, OVER OBJECTION, COMPUTATIONS AND SUMMARIES PREPARED BY THE GOVERNMENT WHICH DID NOT ACCURATELY REFLECT INCOME AND WHICH CONTAINED OMISSIONS, INTERPRETATIONS, DISCREPANCIES WITH THE RECORD, INCORRECT ASSUMPTIONS, MATTERS OUTSIDE THE RECORD AND CONCLUSIONARY CAPTIONS**

The last witness presented by the Government was James C. Stanley, an Internal Revenue Agent from Terre Haute, Indiana, who had sat in the court room during the Government's case. He stated that he had heard all of the testi-

mony that had been offered and had made certain schedules and computations based on the evidence which reflected the income tax computation of the defendant and his wife for the years 1962 and 1963, respectively, by the bank deposits method (A-227, 228).

The defendant objected to Exhibits 43 and 44 as well as any testimony of Mr. Stanley and the objection was overruled (A-235 to 244). (While Government's Exhibit 43 and Mr. Stanley's testimony relative thereto was directed to the year 1962 for which the defendant was found not guilty, it is submitted that such could have had a prejudicial effect on the jury in reaching their verdict of guilty as to 1963, Count II. Since the exhibits were, for the most part, in the same form, the argument will be directed only to Government's Exhibit 44 and the testimony relating thereto.)

The grounds for the defendant's objection to Government's Exhibit 44 were that there was no basis for using an indirect method of proof because the defendant's records were adequate and there were no undisclosed sources of income; that it invaded the province of the jury; that it constituted note-taking for the jury by one who had not testified and was merely a spectator; that it was a duplication of certain evidence giving it undue prejudicial weight; that it contained matters based upon uncorroborated extra-judicial admissions of Mr. Stein to Mr. Shaw, which Mr. Shaw had stated he made no effort to corroborate; that Mr. Shaw had admitted that there could be other non-income items which had not been deducted; that the exhibit contained only certain evidence; that it contained conclusionary captions; and that it contained matters not in evidence (A-235 to 243).

The Government had made no effort to determine any unreported income by direct proof of specific income. The defendant's records were adequate. There were no undisclosed sources of income. The requirements of *United States v. Nunan* (C.A. 2, 1956), 236 F.2d 576;

*Hilbrook v. United States* (C.A. 5, 1954), 216 F.2d 238, and *Gleckman v. United States* (C.A. 8, 1935), 80 F.2d 394, had not been met. The exhibit contained uncorroborated figures such as cost of living which came from extrajudicial admissions which Mr. Shaw had made no attempt to corroborate. *Smith v. United States*, 348 U.S. 147. Mr. Shaw had admitted that there could have been other non-income deposits which he had not deducted (A-175). Mr. Goldstein stated that there could have been other disbursements from Francis I. duPont and Company (A-93, 94). Mr. Profeta testified that there were more payments to the defendant than were reflected by Government Exhibit 42 and more than Mr. Shaw had deducted (A-97, 101). Mr. Shaw's deductions of Profeta loan payments had come only from an examination of Mr. Stein's checks (A-133). Mr. Shaw's determination of the non-income deposits was not made from an examination of the actual checks deposited but only from the deposit tickets which showed only amounts (A-175, 186, 187, Government Exhibit 38). He based his conclusions on an interview with Mr. Stein on May 19, 1965, where Mr. Stein was expected to remember non-income deposits in 1963 without the benefit of the actual checks and was guessing (A-127, 173). Ruth Hawkins (A-286 to 290), Anna Greenstein (A-290 to 293), Ben Weiss (A-299 to 301), Selma Stein (A-305 to 325) and Nathan Stein (A-378 to 388) all subsequently testified to additional non-income payments to the defendant. Mr. Stanley stated that Government's Exhibit 44 was based upon the assumption that all non-income deposits had been excluded, that all deposits represented taxable income and that if that assumption was wrong, the exhibit would be wrong; that his conclusions were based upon Mr. Shaw's conclusions because he had not looked at any deposited checks (A-268, 269). No cash deposits were considered as non-income items (A-176). Thus, there was an incorrect assumption without evidentiary support that all of the deposits, with the exception of those excluded by Mr.

Shaw, constituted taxable income. A hypothetical question based upon such an assumption was rejected in *Kirsch v. United States* (C.A. 8, 1949), 174 F.2d 595. In *Steele v. United States* (C.A. 5, 1955), 222 F.2d 628, admitting charts which contained ommissions, interpretations and discrepancies with the record were held to be reversible error. In *United States v. Ward* (C.A. 3, 1948), 169 F.2d 460, it was held that the summaries, even with a cautionary instruction, in effect made the preparer a thirteenth juror and usurped the function of the jury in determining credibility. The exhibit was offered as a summary of all the evidence (A-227). It was not. *Flemister v. United States* (C.A. 5, 1958), 260 F.2d 513; *United States v. Altruda* (C.A. 2, 1955), 224 F.2d 935.

Government's Exhibit 44 (A-636 to 638) contains numerous captions such as "Gross Receipts from Business," "Gross Profit from Business," "Dividends not Deposited," "Corrected Taxable Income," "Understatement of Income as Adjusted," "Total Income Tax Paid," and "Understatement of Income Tax." In *Lloyd v. United States* (C.A. 5, 1955), 226 F.2d 9, the court stated that charts should be confined to strictly mathematical computations and should not contain conclusionary captions such as "overstatement of merchandise purchases," "overstatement of expenses," "underreported income," etc. In *Watkins v. United States* (C.A. 1, 1961), 287 F.2d 923, an exhibit was held to be prejudicial which listed the expense items on the tax returns as compared to the figures on the taxpayer's books and labeled the difference as "overstated."

The term referred to above as "Dividends not deposited" was a conclusion not based on any evidence. There was no testimony of any undeposited dividends.

Page 3 of Government's Exhibit 44 was offered and admitted into evidence before there was any evidence admitted of which it could have been considered a summary. It was entirely the evidence of Mr. Stanley based

upon the preceding two pages and was handed to each juror before Mr. Stanley testified as to anything on the exhibit (A-245). The testimony of Mr. Stanley contained on page 3 of the exhibit was not brought out by any question, hypothetical or otherwise. It is based upon facts not in evidence at the time the exhibit was handed to the jury or at the time Mr. Stanley read aloud the figures and his conclusions based upon his conclusions on the preceding pages (A-262). His testimony of understatement of income did not coincide with that shown on page 3 (A-262). The page 3 caption "Total income tax paid" was not based on evidence. There was absolutely no evidence as to the amount of income tax paid. Matters contained in summaries must first have been in evidence. *Lloyd v. United States,* 226 F.2d 9.

Government's Exhibit 44 contains different figures as to understatement of income; $38,711.23 on page 2, which is adjusted to $34,056.23 because of bookkeeping errors; and $35,890.13 on page 3, after bookkeeping errors had been deducted. In addition to the prejudicial effect of putting bookkeeping errors in at arriving at gross profit (lines 26 and 27, page 1, Government Exhibit 44) and then taking them out (line 11, page 2) in arriving at understatement of income, they resulted in an erroneous figure labeled as understatement of income on page 3. Mr. Stanley's oral testimony was that the understatement of income was $38,711.23 (A-262). His page 3 computation of tax was based on the understatement of income figure appearing on page 3 (A-638). This had to have had a prejudicial effect on the jury. Even the court was confused as to what the Government had proved (A-615, 629).

Mr. Stanley admitted that the computation in Government Exhibit 44 showed an understatement of more than $3,000.00 higher than had the gross receipts shown on Exhibit 44 been compared with the gross receipts reported on the return (A-269, 270).

The admission of Government's Exhibit 44 was prejudicial error.

**5. THE GOVERNMENT'S KNOWN USE OF TAINTED TESTIMONY VITIATED THE ENTIRE TRIAL WHICH RESULTED IN THE CONVICTION OF PETITIONER**

The Government relied heavily upon the testimony of Special Agent Shaw, and Government Auditor Mehrlich, and the bounty hunter, Gerald Waterman, a former employee of the petitioner.

Plain error was involved in this case by the Government's use of the aforesaid witnesses when the record affirmatively shows that their testimony violated the fundamental constitutional rights of your petitioner.

It has long been settled that this Court will not be bound by the findings of lower courts when it is alleged, as here, that fundamental rights were violated, but which were not alleged in the lower courts, amounts to Plain Error.

*Jacobellis v. Ohio,* 378 U.S. 184 (1964);
*Haynes v. Washington,* 373 U.S. 503 (1963);
*Watts v. Indiana,* 328 U.S. 49 (1949);
*Hooven and Allison v. Evatt,* 324 U.S. 652 (1945);
*Norris v. Alabama,* 294 U.S. 587 (1935).

We have said "the duty of this Court makes its own independent examination of the record when federal constitutional deprivations are alleged, and resting, as it does, on our solemn responsibility for maintaining the Constitution inviolate." *Napue v. Illinois,* 360 U.S. 264, 271 (1959).

The only reasonable construction to be placed upon the "testimony" of Gerald Waterman is that he was seeking revenge upon his former employer, petitioner herein, Waterman being a former employee of the Ideal Meat Company. To permit the Government to use such tainted testimony as this is akin to the Government's use of the testimony of Informer Partin in the case of *"Hoffa v. United States,"* ___ U.S. ___, and the statement of the then Chief Justice Warren in his dissenting opinion therein

certainly seems appropriate in the case at bar. There could be no question that Waterman had an interest in the outcome of this case; certainly he sought and stood a good chance of getting 10 percent of the recovery of any sums adjudged to be owing by the petitioner as the reward of a tax informant; and, secondly, he logically would be getting revenge upon his former employer under the guise of legality. Waterman certainly wormed his way into Stein's employment, friendship and confidence, and indeed, he ingratiated himself in such a way that he was in a position to create an atmosphere wherein conversations could result which would bear the semblance of actuality and legitimacy because of the aforesaid relationship. Certainly it cannot be contended that the Government could have known or could have instructed Waterman to become the equivalent of a bugging device which could reveal to the Government the financial transactions of Stein, but we do say that it is not only possible, but very probable, that Waterman concocted his testimony for the reasons set forth.

Without Waterman's "testimony" the Government would have been unable to make a case against Stein. We quote the dissenting opinion of the then Chief Justice Warren in *Hoffa v. United States:*

> "This type of informer and the uses to which he was put in this case evidence a serious potential for undermining the integrity of the truth-finding process in the federal courts. Given the incentives and background of Partin, no conviction should be allowed to stand when based heavily on his testimony. And that is exactly the quicksand upon which these convictions rest, because without Partin, who was the principal government witness, there would probably have been no convictions here. Thus, although petitioners make their main arguments on constitutional grounds and raise serious Fourth and Sixth Amendment questions, it should not even be necessary for the Court to reach those questions. For the affront to the

quality and fairness of federal law enforcement which this case presents is sufficient to require an exercise of our supervisory powers. As we said in ordering a new trial in *Mesarosh v. United States,* 352 U.S. 1, 14 (1956), a federal case involving the testimony of an unsavory informer who, the Government admitted, had committed perjury in other cases:

> 'This is a federal criminal case, and this Court has supervisory jurisdiction over the proceedings of the federal courts. If it has any duty to perform in this regard, it is to see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity.'

"The government of a strong and free nation does not need convictions based upon such testimony. It cannot afford to abide with them."

See also *McNabb v. United States,* 318 U.S. 332, 341 (1943).

For the above reasons the testimony of Waterman should be excluded, but in addition to that, the cases cited by the Government in support of the Trial Court's discretion on remoteness of testimony are not only misplaced but are inapposite. (*Mitchell v. United States,* C.A. 9, 1954, 213 F.2d 951.) In that case, the defendant had previously been indicted and acquitted for the years 1942-1946, and evidence concerning those years was used by both sides. It was held that in that case the Court did not abuse its discretion in admitting evidence of deficiencies from 1938-1941, as there was other evidence of intent, such as a warning from the Revenue Agent about bank deposits, followed by the defendant's deliberate withholding of funds from deposits, but in the case at bar there was no other evidence of intent.

In the Court below the Government states that it has repeatedly been held that in a tax evasion case two years is not too remote in time for the admissions of evidence

of willfulness and cites *Ballantyne v. United States* (C.A. 5, 1961), 293 F.2d 112; *United States v. Herskovitz* (C.A. 2, 1953), 209 F.2d 881; *Sanseverino v. United States* (C.A. 10, 1963), 321 F.2d 714; *Pappas v. United States* (C.A. 10, 1954), 216 F.2d 515; and *Palermo v. United States* (C.A. 9, 1958), 254 F.2d 131. Each had to do with the admission of evidence of false and fraudulent tax returns in consecutive prior years to show a pattern of conduct. In each case, the evidence was held properly admitted as showing either a pattern of criminal conduct (*Ballantyne* and *Herskovitz*), a continuous line of similar conduct extending uninterruptedly over a period (*Pappas*), and similar conduct leading to understatements of income (*Palermo*).

Here there was no pattern of conduct. There was no evidence of underreporting in prior years. The Waterman testimony did not show any pattern or continuity of motive or similar conduct. It was a conversation unconnected with the filing of the 1963 return and in excess of two years prior thereto. It was the only intent evidence which the Government had to offer. *Boyer v. United States* (C.A.D.C. 1942), 132 F.2d 12, cited in Appellant's Brief in the Court below, held that a conversation nearly two years prior to the offense was not so connected in point of time and circumstances as to throw light on mental state.

**6. THE TRIAL COURT'S INSTRUCTION EXPANDED THE INDICTMENT CONTRARY TO THE RULE OF *STIRONE v. UNITED STATES*, 361 U.S. 212 (1960). OVER DEFENDANT'S OBJECTION, THE TRIAL COURT INSTRUCTED THE JURY THAT CAPITAL LOSSES INCURRED DURING THE YEAR MUST BE ADDED TO AN INCREASE IN NET WORTH WHICH WAS A DISPUTED FACT AND WHICH REQUIRED THE JURY TO ADD A SUBSTANTIAL ERRONEOUS AMOUNT TO THE 1963 NET WORTH COMPUTATION OF CORRECTED INCOME**

During the trial a dispute arose with respect to whether in computing income by the net worth and expenditures method it was necessary to add to any increase in net worth the non-deductible portion of capital losses. Inasmuch as the Government had not offered in evidence its computation of the defendant's income by the net worth and expenditures method, it was necessary for the defendant to call as his witness, Special Agent Dean Shaw to testify as to the defendant's assets and liabilities and expenditures which he had determined during the course of the investigation (A-335 to 365).

During the cross-examination of Mr. Shaw by the attorney for the Government, he stated that the non-deductible capital losses would be added to the increase or decrease of net worth (A-366). There followed additional questions with the Court entering into the dispute with questions which were argumentative (A-367).

Mr. Helvin January, a Certified Public Accountant, testified as a defense witness regarding his computation of the defendant's income based upon the net worth and expenditures method. On cross-examination, Mr. January stated that he had not taken into consideration the non-deductible portion of capital losses because losses could have come from cash or stocks owned in previous years (A-582). There followed argument between the attorney for the Government and Mr. January, wherein the attorney for the Govern-

ment assumed additional earnings during the taxable year to make up for the capital loss (A-584, 585).

The defendant tendered as his Instruction No. 25 an instruction on the net worth and expenditures method (A-642). The Court gave its Instruction No. 16 which was defendant's Tendered Instruction No. 25 but to which the Court added at the end of the fourth paragraph the words, "including any capital losses incurred during the year, if any" (A-643). The defendant objected to the inclusion of those words (A-610, 611).

Whether, in determining Mr. Stein's income by the net worth and expenditures method, non-deductible capital losses should be added was a disputed fact. The Court not only entered into the dispute but instructed the jury that capital losses must be added without regard to any deductible portion. The Court not only instructed the jury on a disputed fact but went further by including all capital losses. When the Court determined that fact and so instructed, it evaded the province of the jury. *United States v. Childress* (C.A. 7, 1965) 347 F.2d 451.

Additional unreported income, taxable in the year 1963, was an essential element. There was a conflict in the evidence as to the amount of additional income in 1963. The indictment charged $42,271.68. The Government's witness, Mr. Stanley, testified that it was $38,711.23 (A-262). Mr. Stanley's computation (Government Exhibit 44) showed $34,056.23 on one page (A-637) and $35,890.13 on another (A-638). The Court, at the time of sentencing, thought it was $44,000.00 (A-629). The defendant's net worth computation showed a total 1963 income of $2,534.50 (Defendant's Exhibit NN), to which was added $1,500.00 because of an additional asset (A-586), which would have resulted in $2,200.60 unreported. The Court's instruction was prejudicial to the defendant in that it had the effect of prejudicing the jury respecting the defendant's net worth computation and the testimony of Mr. January.

The instruction required the jury to add to the defendant's net worth computation, a substantial amount to the taxable income for the year 1963. Schedule D, page 2, of the 1963 tax return (Government Exhibit 3) gives the impression that the total capital loss was $13,181.54. The Court in Instruction No. 16 told the jury that this amount had to be added to any increase in net worth and non-deductible expenditures in arriving at taxable income for 1963. This instruction, itself, directed the jury to find a substantial amount of additional income in 1963; an essential element of the offense. Such was reversible error. *United States v. England* (C.A. 7, 1965) 347 F.2d 425. In addition, without the prejudicial error in instructing the jury to find an essential element, the instruction required the jury to add an erroneous amount. While the 1963 return shows a total capital loss of $13,185.54, a close examination, hardly expected of the jury, shows that $11,854.61 of that amount was a carry-over from the year 1962 (Government Exhibits 2 and 3) and the total 1963 capital loss was only $514.93 (although an error in computation shows it to be $1,330.93). The non-deductible portion would have been zero. The jury was instructed to add $13,125.54.

The Trial Court's error in this instruction amounted to the exclusion, inter alia, of the theories of the defense, in that it required the jury to add to the defendant's net worth computation a substantial amount for the taxable income for the year 1963.

> "The purpose of a charge is adequately, yet succinctly, to instruct the jury as to its function, which is the independent determination of the facts, and the application of the law, as charged by the court, to the facts, as found by the jury. Repetitious and unnecessarily long charges are confusing to a jury and prevent it from properly exercising its function." *United States v. Persico,* 2 Cir. 349 F.2d 6, 8.
>
> "When a party has the burden of proof as to a factual issue, it cannot be proper that instructions pertaining to the issue are so vague or ambiguous as

to permit of misinterpretation by the jury of the standard which is to be applied." *Notaro v. United States,* 9 Cir. 363 F.2d 169, 175.

"It is no answer to say that the supplemental instruction was correct, so far as it went; or that it was to be read in the light of the original instructions and that these fairly presented the issues. The ultimate question is 'whether the charge taken as a whole was such as to confuse or leave an erroneous impression in the minds of the jurors.' *Perez. v. United States,* 297 F.2d 12, 16 (5th Cir. 1961). See also *Bland v. United States,* 299 F.2d 105, 108-109 (5th Cir. 1962); *United States v. Christmann,* 298 F.2d 651 (2d Cir. 1962)."

*Powell v. United States,* 9 Cir. 347 F.2d 156, 158.

The Trial Court's instruction varied materially from the crime charged in the indictment. The rule of the Court of Appeals is in conflict with the principle reiterated by this Court in *Stirone v. United States,* 361 U.S. 212, 217, 219 (1960). The Trial Court thus committed prejudicial and reversible error in the giving of this repugnant instruction to the jury so that it was impossible to determine whether the verdict of the jury was based on a correct or incorrect instruction.

". . . a court cannot permit a defendant to be tried on charges that are not made in the indictment against him.

* * *

". . . The right to have the grand jury make the charge on its own judgment is a substantial right which cannot be taken away with or without court amendment. Here, as in the *Bain* case [Ex parte Bain, 121 U.S. 1 (1887)], we cannot know whether the grand jury would have included in its indictment a charge that commerce in steel from a non-existent steel mill had been interfered with. Yet because of the court's admission of evidence and under its charge this might have been the basis upon which the trial

jury convicted petitioner. If so, he was convicted on a charge the grand jury never made against him. This was fatal error."
*Stirone v. United States, supra.*

*Samuels v. United States,* 169 F.2d 787, 792.
*Bollenbach v. United States,* 326 U.S. 607, 614.
*Nicola v. United States,* 72 F.2d 780, 787.
*United States v. Donnelley,* 7 Cir. 179 F.2d 227, 233.
*United States v. Semeniuk,* 7 Cir. 193 F.2d 508.
*Patterson v. United States,* 5 Cir. 182 F.2d 687, 690.

## CONCLUSION

For the errors committed by the lower Court, it is respectfully urged that appellant's conviction must be reversed.

Appellant respectfully submits that this Honorable Court should remand the cause to the lower Court with the instructions for a new trial; that the witness Waterman not be allowed to testify because of the incompetency of his testimony aforesaid; that the cause be remanded with instructions to the lower Court to sustain appellant's appeal, and that appellant be granted a new trial, and for all other further, proper and complete relief in the premises.

Respectfully submitted,

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## APPENDIX A

# In the United States Court of Appeals

## For the Seventh Circuit

SEPTEMBER TERM, 1970 — SEPTEMBER SESSION, 1970

No. 18296
UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*
v.
NATHAN STEIN,
*Defendant-Appellant.*

Appeal from the United States District Court for the Southern District of Indiana.

February 9, 1971

Before DUFFY, *Senior Circuit Judge,* FAIRCHILD and PELL, *Circuit Judges.*

PELL, *Circuit Judge.* Defendant Nathan Stein was indicted in two counts for wilfully attempting to evade and defeat federal income taxes due and owing for the calendar years 1962 and 1963, in violation of Section 7201 of the Internal Revenue Code of 1954, 26 U.S.C. §7201. Following a trial by jury, Stein was found and adjudged innocent as to the 1962 count but guilty as to the 1963 count. The court imposed a fine of $2500 plus costs and a prison sentence of one year. From this judgment and sentence defendant has appealed.

Defendant had been engaged in the business of buying and selling meat at wholesale in Indianapolis, Indiana since 1956. He employed an accountant to keep his books and prepare his tax returns, both on a cash basis. The accountant worked with sales figures supplied by Stein which the accountant did not independently verify. Stein was a calendar year taxpayer.

Revenue agents first examined defendant's books in March 1964, and a special agent was assigned to the case in May 1964. The agents reconstructed defendant's income for 1963 on the bank deposits method. From his total deposits plus cash expenditures equalling $394,668.11, they subtracted $18,428.12 in non-income deposits. After subtracting defendant's cost of goods sold, a gross profit from business of $78,747.08 remained. From this was subtracted his operating expenses, as well as various exclusions, exemptions and deductions, leaving a taxable income figure of $40,545.13. Defendant's return for 1963 reported his taxable income as $1,833.90, an alleged understatement of nearly $39,000.

The bank deposit method of proving the understatement was followed exclusively by the government at trial. Any possibility of direct proof of defendant's income was eliminated when his sales invoices were allegedly destroyed by a fire of undetermined origins in his office during April 1965, nearly a year after the beginning of the investigation. Defendant testified that before the fire he had offered these invoices to the revenue agents but that they had not yet sought to examine them at the time of their destruction.

The government offered direct evidence of wilfulness in the testimony of Stein's former employee, Gerald Waterman. Over defendant's objection based on remoteness, Waterman testified that in 1962 he had a conversation with Stein in a restaurant during which Stein told Waterman that he, Stein, would have no hesitancy, with the assistance of his accountant and attorneys, about "cheating the Government as well as I would cheat anybody else, which includes my help, my customers."

On cross examination, Waterman admitted that he had not referred to this conversation in a signed statement given to revenue agents and that the only conversation mentioned in that statement was one in the presence of two other employees. Both of these employees denied knowledge of any such conversation. Defendant denied the conversation with Waterman. It was shown that Waterman had previously brought a suit against defendant which was dismissed and that he had applied for the 10% reward from the Internal Revenue Service.

The government rested on the basis of the bank deposit computation and Waterman's testimony.

Stein testified that in 1962 he had included $9,000 in year-end accounts receivable in his ending inventory, thus reducing cost of goods sold and increasing gross profits. He did not report the collection of these receivables in 1963 on the basis that he had already paid tax on them in 1962. There would not seem to be double taxation here since the 1962 ending inventory was carried forward as the 1963 opening inventory.

At the end of 1963, defendant's accounts payable would have exceeded his receivables and produced a negative inventory figure under his method of accounting. Defendant, assertedly feeling that some year end inventory had to be shown, solved the problem by not reporting collections of nearly $15,000 in receivables made during the last week of 1963, thus leaving this amount as ending inventory to be carried forward. Stein also instructed his accountant to post every expenditure after December 24, 1963 into 1964.

Defendant further sought to show the existence of over $9,000 in non-income deposits to his bank accounts during 1963 which had not been previously reported to the investigating agents.

The government conceded an additional $4,600 of unreported income was due to good faith accounting errors.

Thus, defendant sought to show that approximately $37,500 of the $39,000 understatement was due to non-income deposits and to good-faith errors and misconceptions of proper accounting techniques.

Defendant also introduced a computation of his income based on the net worth method. By this computation, his taxable income for 1963 was approximately $4,000 rather than the $40,545 alleged by the Government.

Finally, defendant presented evidence intended to show good faith and lack of wilfulness. His 1963 return was apparently filed after he was aware of the pending investigation. He gave his full cooperation to the investigating agents. There was no evidence of a double set of books. No hidden bank accounts were discovered. No

unreported sources of income were shown. Of the four years subject to investigation, only two led to prosecution and only one to conviction.

Defendant's primary contention on this appeal is that the evidence was insufficient to prove his guilt beyond a reasonable doubt. We cannot agree. Of course, we do not weigh the evidence nor determine the credibility of witnesses. Given the verdict of guilty, we must consider the evidence in the light most favorable to the government's position. *Glasser* v. *United States*, 315 U.S. 60, 80 (1942).

In tax evasion cases, a not uncommon attribute seems to be a lack of precise and clear recordation and documentation. The case before us is no exception. Whether the scarcity, murkiness or ambiguity of supporting data in any particular case is purposeful or merely inadvertent is no doubt often a matter to which the trier of fact gives some determinative consideration. In the trial forum there is the opportunity to observe and evaluate credibility. We, faced only with a cold record, must ordinarily give our credibility to resolutions of fact which follow the opportunity of direct observation available to, and presumably availed of by, the trier of fact.

Defendant first argues that the government's use of the bank deposit method was insufficient to show substantial unreported income in 1963. While unexplained deposits in excess of reported income is not alone proof of unreported income, it is "a rather convincing circumstance in support of the charge." *Malone* v. *United States*, 94 F. 2d 281, 287 (7th Cir. 1938), *cert. den.* 304 U.S. 562. "Of course, proof under the bank deposit theory is circumstantial in nature, but we know of no reason why such deposits may not be considered in determining income, when there is no evidence that they represent anything other than income." *United States* v. *Doyle*, 234 F. 2d 788, 793 (7th Cir. 1956), *cert. den.* 352 U.S. 893.

However, Stein asserts that in the instant case there was no proof that all non-income items had been eliminated from the government's computation. Of course, the same could be said of any bank deposit case. But the record is clear that the agents made a thorough study of all leads provided by defendant and in every case gave

defendant the benefit of the doubt in eliminating possible non-income items. No more is required. *Holland* v. *United States*, 348 U.S. 121, 135-36 (1954).

Defendant also complains that all the non-income eliminations were based on a brief interview in which he attempted to recall non-income items merely by looking at a column of figures representing his deposits. However, nothing prevented defendant from giving the matter additional careful thought and contacting the agents as he thought of other items.

Further, this privilege of adducing proof of additional items of non-income character continued into the trial. Even at this late stage when Stein certainly must have been aware of the seriousness of that with which he was confronted, and conceding the credibility of his trial proofs, he was able to account for only another $9,000 in non-income items to reduce the $39,000 understatement of income. There is no requirement that the government establish the exact amount of unreported income, as proof of a substantial sum will suffice. *United States* v. *Johnson*, 319 U.S. 503, 517 (1943); *United States* v. *Chapman*, 168 F. 2d 997, 1001 (7th Cir. 1948), *cert. den.* 335 U.S. 853.

Defendant further complains that the government's bank deposit proof was not corroborated by a net worth proof. However, we, like other circuits, have previously sustained convictions where the only proof of unreported income was a bank deposits analysis. *United States* v. *Mansfield*, 381 F. 2d 961 (7th Cir. 1967), *cert. den.* 389 U.S. 1015. *See also United States* v. *Procario*, 356 F. 2d 614 (2d Cir. 1966), *cert. den.* 384 U.S. 1002; *United States* v. *Moody*, 339 F. 2d 161 (6th Cir. 1964); *Hoyer* v. *United States*, 223 F. 2d 134 (8th Cir. 1955); *Holbrook* v. *United States*, 216 F. 2d 238 (5th Cir. 1955), *cert. den.* 349 U.S. 915; *Graves* v. *United States*, 191 F. 2d 579 (10th Cir. 1951); and *Stinnet* v. *United States*, 173 F. 2d 129 (4th Cir. 1949), *cert. den.* 337 U.S. 957.

Furthermore, this record is not completely without corroborating evidence. Stein introduced a net worth analysis which, with proper adjustments for omitted assets and for liabilities to family members not substantiated except by defendant's self-serving testimony, shows unreported income of over $9,000. This is certainly an

amount substantial enough to establish the fact of unreported income.

We find it significant that while Stein complains of the government's reliance on the circumstantial evidentiary proof of bank deposits, a substantial aspect of this own defense was predicated on a net worth analysis, itself only circumstantial evidence, rather than a direct proof that the amount determined by the bank deposit method included other non-income items.

Insofar as Stein assayed at direct proof some of this at least would seem to have been sufficiently ambiguous as to have been questionable to the jury. An investment firm account executive, for example, testified that he could not say "for certain" that the exhibits in evidence were all of the checks paid by his firm to Stein in the years in question.

Stein also contends on appeal that the figure deducted as repayment of loans from one Profeta was not complete; however, the record reveals that while Profeta, a government witness, had lost most of his checks, the government brought out in his testimony the total number and amount of these checks.

Further, it must be noted that the net worth analysis exhibit put into evidence by Stein contains some variables such as year end value of securities which, of course, does not necessarily represent the amount of money invested therein during the course of the preceding year. Also, the government challenges the validity of the net worth analysis as it included trade accounts payable which the government asserts have no place therein as Stein was on a cash basis. While we have some difficulty in understanding why in preparing a financial statement, which is what the net worth analysis exhibit was, all liabilities including trade accounts payable should not be included, nevertheless, as we have already said, this exhibit was merely a different type of circumstantial evidence and the jury obviously chose to find it did not achieve persuasive credibility.

Finally, the government in preparing its bank deposit analysis, accepted Stein's affidavit as to the amount of business and living expenses paid by the defendant by cash rather than check. These expenses amounted to

almost $15,000 and constitute some indication of a cash flow outside of money actually deposited in banks.

Thus, we conclude that there was ample evidence showing the existence of substantial unreported income. However, defendant next maintains that there was insufficient evidence to establish that this failure to report income was the product of fraud rather than good faith misunderstanding. The jury had before it the same accounting explanations and the same evidence of good faith that defendant now presses upon us. It also had before it Waterman's testimony as direct evidence of wilfulness. We cannot now ignore its assessment of this conflicting evidence and its conclusion based thereon that defendant did act wilfully.

Defendant next asserts that the government's case was deficient in that there was no proof of the amount of tax paid by defendant in 1963 making it impossible to determine whether any tax remained due and owing. We agree with the government that the gist of the offense charged in the indictment was evasion of tax assessment rather than evasion of tax payment. *See Sansone* v. *United States*, 380 U.S. 343, 354 (1965) Thus, the amount actually paid was irrelevant and the government was required to show only that defendant attempted to evade the assessment by fraudulently understating his taxable income on his return. We have previously found that the government met this burden.

Defendant further objects that venue was not proved. We find ample evidence in the record to indicate that the return was filed in Indianapolis, Indiana, within the Southern District of Indiana where defendant was prosecuted.

Stein further claims error in the trial court's instruction that capital losses incurred during 1963 should be added to any increase in net worth. In part, the defendant claims that the jury was in effect instructed to add the sum of $13,125.54. This figure, however, represented the capital loss carry-over available to defendant at the end of 1963 and consisted mainly of losses incurred by him prior to 1963. The instruction did not tell the jury to add this amount but only "any capital losses incurred during the year if any." This clearly limited the amount to $514.95.

Secondly, the defendant contended that the instruction was incorrect inasmuch as whether capital losses should be added to any increase in net worth was a disputed fact. Even if defendant were correct that this instruction was erroneous, any error would be non-prejudicial in light of the fact that his capital losses for 1963 amounted to $514.93. The addition of this amount in a case of this magnitude would be insignificant.

Defendant next alleges error in the denial of his motion to strike the testimony of Waterman as too remote. The trial court has broad discretion in such matters. *Mitchell* v. *United States*, 213 F. 2d 951, 958 (9th Cir. 1954), *cert. den.* 348 U.S. 912 (1955). The record reveals careful consideration of the motion by the trial court and we find no abuse of discretion in its denial.

Defendant challenges various rulings of the trial court as unduly limiting the scope of cross-examination of government witnesses. Again, this is an area where the trial court has "traditionally wide latitude," *United States* v. *Allegretti*, 340 F. 2d 254, 258 (7th Cir. 1964), *cert. den.* 381 U.S. 911 (1965), and 390 U.S. 908 (1968), and the record reveals nothing which we find to be an abuse of that discretion.

Defendant's final objection is to the admission of government's Exhibits 43 and 44, the summaries of the government's bank deposits reconstruction of his income and tax liability. All of the substantial challenges advanced by defendant to the use of such summaries have been long since considered and rejected by the Supreme Court, *Holland* v. *United States, supra*, 348 U.S. at 130-32 and *United States* v. *Johnson, supra*, 319 U.S. at 519-20, and require no further discussion here.

Other contentions of Stein, not expressly dealt with herein, have been considered and found without merit. Accordingly, the judgment of conviction and sentence must be affirmed.

AFFIRMED.

A true Copy:
Teste:

.....
*Clerk of the United States Court of Appeal for the Seventh Circuit.*

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## APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

September Term, 1970 September Session, 1970

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No. 18296

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| | | |
|---|---|---|
| UNITED STATES OF AMERICA, Plaintiff-Appellee | ) | |
| v. | ) | Appeal From the United States District Court for the Southern District of Indiana, Indianapolis Division |
| NATHAN STEIN, Defendant-Appellant | ) | |

## PETITION FOR REHEARING

Defendant-Appellant, NATHAN STEIN, respectfully petitions the Court to set aside his Judgment of Affirmance rendered on February 9, 1971, and to rehear the cause and reverse the Judgment of the District Court.

Defendant-Appellant suggests that the Court has overlooked or misapprehended the record and the law of the case as follows:

### I

### THE EVIDENCE PRESENTED IN THIS CASE WAS INSUFFICIENT TO PROVE THE GUILT OF DEFENDANT-APPELLANT BEYOND A REASONABLE DOUBT.

Admittedly, this Honorable Court does not weigh the evidence nor determine the credibility of the witnesses; nevertheless, proof must establish beyond a reasonable doubt all the material allegations of the indictment, and

here it was necessary to prove that appellant wilfully attempted to evade and defeat Federal Income Taxes due and owing for the calendar year of 1963. It is obvious from the record herein that the Government's case would dismally fail absent the testimony of Gerald Waterman. Waterman testified: That in March or April of 1962, he and Mr. Stein had lunch in a restaurant in Elwood, Indiana, and that during the course of the conversation over lunch, he told Mr. Stein that if his earnings from the stock market, the meat company and real estate holdings were grossing so much, he could net very little because with the tax situation he would be paying most of it to Uncle Sam. To this, Mr. Stein replied that he had no hesitancy in cheating the Government as he would cheat anybody else (A-209). On cross-examination, Mr. Waterman admitted that in a written statement he had given to agents of Internal Revenue he had not mentioned any trip with Mr. Stein to Elwood, Indiana, or any conversation in a restaurant either in Elwood or any other place (A-212, 215). All that he had mentioned in his signed statement were conversations at the premises of the Ideal Meat Company and that such conversations were in the presence of Gerald Fivel and Robert O'Koon (A-212 to 216). Mr. Waterman stated that at one time he had filed a law suit against Mr. Stein, which had subsequently been dismissed and that Mr. Waterman had applied for the 10% reward from the Internal Revenue Service (A-217).

Immediately after the testimony of Mr. Waterman, the defendant moved to strike his testimony on the ground that it did not constitute an admission, and it was too remote in time to be considered part of the res gestae. The motion was overruled by the Court. (A-221 to 224).

It is obvious, therefore, that Mr. Waterman not only had an interest in the outcome of the trial from monetary considerations but that he was vindictive and also chagrined because of his prior business relationship with the defendant. The fact that Waterman instituted a law suit against

the defendant, which was subsequently dismissed, and the fact that Waterman had applied for the 10% reward from the Internal Revenue Service, likewise subjects his testimony to close scrutiny.

If it is accepted as proved that intent to defeat or evade taxes can be proved by a disgruntled employee, then any employer could be subjected to this type of activity.

The interest, bias, prejudice, over-zealousness, and the antagonistic attitude of Waterman could not be defended by the appellant, except that Waterman admitted that in written statements he had given to the Internal Revenue he had not mentioned any trip with appellant Stein to Elwood, Indiana, or any conversations in a restaurant either in Elwood or any other place (A-212-215).

Appellant adopts the cases set out in his original brief with reference to declarations made at the time an offense is being committed or as part of the offense are usually considered part of the res gestae, and are permissible to show knowledge and intent (See *Warszower v. United States,* 312 U.S. 342. Warszower was convicted of violating a statue making it an offense to wilfully and knowingly using a passport, the issue of which was made by a false statement. The United States Supreme Court held:

> "that admissions by a person charged with a crime tending to establish guilt do not require corroboration where made prior to the commission of the alleged offense."

However, the declarations must not be remote and the supposed declaration not supported by the evidence, as set out above, is not only too remote to be relevant on the issue of intent (*Weiss v. United States,* 122 F.2d 675; *Boyer v. United States,* 132 F.2d 12), but they are questionable since said alleged declaration was not reported by Waterman to the Internal Revenue Agents as hereinabove set out, and furthermore, they were denied.

The statement, therefore, by Waterman attributable to the defendant is too remote to be relevant on the issue of

intent, and furthermore, being disproved by Waterman's admission that he had not mentioned the same to the Internal Revenue Agent gives rise to reasonable belief that Waterman's testimony was given solely for his financial profit plus an endeavor to get revenge, and accordingly, it is not beyond the realm of probability that he concocted the same.

Therefore, the verdict of the jury could have been predicated solely on the testimony of Waterman, and there is an absence of substantial support for the verdict of guilty, taking into consideration that the Government's bank deposit proof was not corroborated by net worth proof. As this Court has said on page 4 of its opinion—

> "The case before us is no exception. Whether the scarcity, murkiness or ambiguity of supporting data in any particular case is purposeful or merely inadvertent is no doubt often a matter to which the trier of fact gives some determinative consideration. In the trial forum there is the opportunity to observe and evaluate credibility. We, faced only with a cold record, must ordinarily give our credibility to resolutions of fact which follow the opportunity of direct observation available to, and presumably availed of by, the trier of fact."

The Court goes on in its opinion on page 7—

> "However, defendant next maintains that there was insufficient evidence to establish that this failure to report income was the product of fraud rather than good faith misunderstanding. The jury had before it the same accounting explanations and the same evidence of good faith that defendant now presses upon us. It also had before it Waterman's testimony as direct evidence of wilfulness. We cannot now ignore its assessment of this conflicting evidence and its conclusion based thereon that defendant did act wilfully."

It is respectfully urged that there is not one single iota of any evidence supporting the finding of guilty beyond a reasonable doubt, but that this Honorable Court has utilized

a number of factors and combined them, and has given these factors the most favorable light most favorable to the Government. The Court concedes on page 4–

> "While unexplained deposits in excess of reported income is not alone proof of unreported income, it is 'a rather convincing circumstance in support of the charge' *Malone v. United States,* 94 F.2d 281, 287 (7th Cir. 1938), cert. den. 304 U.S. 562".

What we are trying to say is that the Court has combined a lot of factors in considering that the evidence is sufficient to support a verdict of guilty, and by strength of numbers alone has concluded that the lump sum of these factors is sufficient to support the Government's theory.

The Court quotes *Glasser v. United States,* 315 U.S. 60. Glasser was an assistant United States Attorney in charge of liquor cases in the State of Illinois, and he and Anthony Horton and Louis Caplan were found guilty on an indictment charging them with a Conspiracy to Defraud the United States of and concerning its governmental function to be honestly, faithfully and dutifully represented in the Courts of the United States, etc., and the means by which the conspiracy was to be accomplished was alleged to be by Glasser and the other two men to promise or cause to be promised certain sums of money to be paid or pledged to the defendants to be used to corrupt and influence Glasser and Kretske in the performance of their official duties. However, since a new trial was ordered for Glasser because of a conflict of interests of his attorney, the case as to Glasser cannot be utilized as a case concerning the sufficiency of the evidence because "admittedly the case against Glasser is not a strong one"–315 U.S. 68.

Glasser was denied the undivided assistance of counsel of his own choice, and the United States Supreme Court ruled that the Seventh Circuit was in error, and set aside his conviction, but upheld the convictions of the co-defendants Kretske and Roth, because in their particular cases the Government's evidence was far stronger than is the Government's case against appellant Stein herein.

The Court cites *Holland v. United States,* 348 U.S. 121. That case can hardly be said to give comfort to the Government's position because in that case the United States Supreme Court held–

> "A final element necessary for conviction is willfulness. The petitioners contend that willfulness 'involves a specific intent which must be proven by independent evidence and which cannot be inferred from the mere understatement of income.' This is a fair statement of the rule. Here, however, there was evidence of a consistent pattern of underreporting large amounts of income, and of the failure on petitioners' part to include all of their income in their books and records. Since, on proper submission, the jury could have found that these acts supported an inference of willfulness, their verdict must stand. *Spies v. United States,* supra (317 U.S. at 499, 500.)

## II

## THE COURT'S RELIANCE ON THE CASES IT CITED THAT THE GOVERNMENT'S BANK DEPOSIT PROOF NEED NOT BE CORROBORATED IS MISPLACED.

The Court, on page 5 of its opinion–

> "Defendant further complains that the Government's bank deposit proof was not corroborated by a net worth proof. However, we, like other circuits, have previously sustained convictions where the only proof of unreported income was a bank deposits analysis."

The Court then cited several cases including–

*United States v. Moody,* 339 F.2d 161.
*United States v. Procario,* 356 F.2d, 614.
*United States v. Mansfield,* 381 F.2d, 961.
*Hoyer v. United States,* 223 F.2d, 134.

The Court apparently overlooked or misapprehended the above cases because in the *United States v. Moody, supra,*

this case was reversed because the Trial Court refused to instruct the jury as requested by the defendant to the effect that if the jury entertained a reasonable doubt as to whether the defendant owed an additional amount of tax, they must acquit the defendant.

In *United States v. Procario, supra,* a Second Circuit case decided in 1966, the Court held that even if the "leads" doctrine applies to bank deposit method cases, lateness and vagueness of leads supplied in this case, coupled with the taxpayer's counsel's' unfulfilled promise to provide more definite information, justified the Government's failure to follow up leads more thoroughly.

In the *United States v. Mansfield, supra,* the Court held that Dr. Mansfield, when filing a subject income tax return, despite the fact that he was in ill health and overworking lengthy hours, and was using inept bookkeeping methods, and that he may have been entitled to certain deductions which would have decreased the amount of tax he owed, in view of the doctor's substantial under-statement of income for subject years. his conviction for wilful evasion of income tax was justified.

*Hoyer v. United States* would tend to favor the appellant in this case because the Eighth Circuit held that evidence of tax computed and paid a prior year was competent as bearing on the question of fraudulent intent.

In the case at bar, appellant Stein was indicted for tax due and owing for the calendar years 1962 and 1963, and he was found not guilty as to the 1962 count but guilty as to the 1963 count. It therefore appears that this case is favorable to the contentions of appellant.

Furthermore, the Court says on page 5 of its opinion—

> "Defendant also complains that all the non-income eliminations were based on a brief interview in which he attempted to recall non-income items merely by looking at a column of figures representing his deposits. However, nothing prevented defendant from giving the matter additional careful thought and contacting the agents as he thought of other items."

Upon any fair consideration of the evidence most favorable to the Government the jury could not have found defendant-appellant guilty of the charge alleged without also having believed that it was the duty of the appellant to prove his innocence. The jury thus cast aside every reasonable hypothesis of innocence and denied the appellant his presumption of innocence, and placed upon appellant the burden of proving his own innocence. These conclusions are not only necessary for the evidence, but, in fact, are admitted by this Honorable Court in the preceding paragraph.

This Honorable Court has said on page 6 of its opinion:

> "Insofar as Stein assayed at direct proof some of this at least would seem to have been sufficiently ambiguous as to have been questionable to the jury. An investment firm account executive, for example, testified that he could not say 'for certain' that the exhibits in evidence were all of the checks paid by his firm to Stein in the years in question."

This bears out the contention of appellant that not only is the evidence woefully insufficient, but the jury required a degree of explanation by appellant, which deprives him of his presumption of innocence and makes it obligatory upon the Government to prove defendant's guilt beyond a reasonable doubt.

Furthermore, this Court's opinion on page 6 thereof states:

> "While we have some difficulty in understanding why in preparing a financial statement, which is what the net worth analysis exhibit was, all liabilities including trade accounts payable should not be included, nevertheless, as we have already said, this exhibit was merely a different type of circumstantial evidence and the jury obviously chose to find it did not achieve persuasive credibility."

It is obvious that this verdict was founded on speculation, guesswork and possibility of guilt and that the verdict should not be permitted to stand.

It is quite apparent from the Court's opinion that there has been a misconception of the true intentment of the doctrine applied in the foregoing cases.

## III

**THE COURT OVERLOOKED OR MISAPPREHENDED THE LAW APPLICABLE TO THE INSTRUCTIONS IN THIS CAUSE. THE COURT UPHELD THE ACTION OF THE TRIAL COURT IN INSTRUCTING THE JURY THAT CAPITAL LOSSES INCURRED DURING THE YEAR MUST BE ADDED TO AN INCREASE IN NET WORTH, WHICH WAS A DISPUTED FACT AND WHICH REQUIRED THE JURY TO ADD A SUBSTANTIAL ERRONEOUS AMOUNT TO THE 1963 NET WORTH COMPUTATION OF CORRECTED INCOME.**

This amounted to a mandatory instruction which this Court attempted to explain on page 8 of its opinion:

> "The addition of this amount in a case of this magnitude would be insignificant."

We respectfully disagree with this Court's ruling because any Instruction given by a Court is given respectful attention by the jury, and it had the effect of indicating to the jury that there should be an addition in the taxes, and even if the capital losses for 1963 amounted to only $514.93, the giving of this Instruction and its effect on the jury is incalculable.

## CONCLUSION

The purpose of a petition for rehearing under rules of some Courts of Appeal is to direct Court's attention to some material matter of law or fact which it has overlooked in deciding the case, and which, had it been given consideration would probably have brought about a different result.

WHEREFORE, for the above and foregoing reasons, it is respectfully prayed that a Rehearing be granted and that upon such Rehearing the Judgment of the Court below be reversed.

Respectfully submitted,

/s/ WILLIAM C. ERBECKER
*Counsel for Defendant-Appellant*

WILLIAM C. ERBECKER
129 East Market Street #901
Indianapolis, Indiana 46204
Telephone: 634-6236

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

September Term, 1970 September Session, 1970

NO. 18296

| | |
|---|---|
| UNITED STATES OF AMERICA, Plaintiff-Appellee v. NATHAN STEIN, Defendant-Appellant | Appeal From the United States District Court for the Southern District of Indiana, Indianapolis Division |

## MOTION FOR STAY OF MANDATE

NATHAN STEIN informs this Honorable Court of his intention, if this Petition for Rehearing is denied, to promptly petition the Supreme Court for certiorari, and prays for a stay of mandate pursuant to Rule 28(b).

NATHAN STEIN
*Defendant-Appellant*

/s/ By William C. Erbecker
*Attorney for Defendant-Appellant.*

B-12

IN THE

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

September Term, 1970 September Session, 1970

NO. 18296

| | |
|---|---|
| UNITED STATES OF AMERICA,<br>Plaintiff-Appellee<br>v.<br>NATHAN STEIN,<br>Defendant-Appellant | Appeal From the United States District Court for the Southern District of Indiana, Indianapolis Division |

## SUGGESTIONS IN SUPPORT OF MOTION FOR STAY

1. After conviction the Trial Court approved defendant's bond in the amount of $1,000.00. Defendant is presently enlarged on bond, and has continued his same residence in the Southern District of Indiana. Defendant intends to surrender if and when required.

2. Counsel is of the opinion that the Supreme Court will have jurisdiction and that substantial questions are involved meriting consideration by the High Court.

3. This motion is made in good faith and not merely for delay.

Respectfully submitted,

/s/ WILLIAM C. ERBECKER
*Attorney for Defendant-Appellant*

STATE OF INDIANA )
COUNTY OF MARION ) SS:
)

## CERTIFICATE OF COUNSEL

WILLIAM C. ERBECKER being duly sworn states that the foregoing suggestions are based upon fact, except as to matters of opinion. As to matters of opinion, affiant believes them to be well founded. Further that these motions are not filed merely for delay.

/s/ WILLIAM C. ERBECKER

Subscribed and sworn to before me, a Notary Public this 20th day of February, 1971.

/s/ _____
Notary Public

My Commission Expires:
October 18, 1972

WILLIAM C. ERBECKER
129 East Market Street #901
Indianapolis, Indiana 46204

Telephone: 634-6236

## APPENDIX C

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

March 2, 1971

Before

Hon. F. RYAN DUFFY, Senior Circuit Judge
Hon. THOMAS E. FAIRCHILD, Circuit Judge
Hon. WILBUR F. PELL, JR., Circuit Judge

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, Plaintiff-Appellee | ) | Appeal from the United States |
| No. 18296 vs. | ) | District Court for the Southern |
| NATHAN STEIN, | ) | District of Indiana, Indianapolis |
| Defendant-Appellant | ) | Division |

### ORDER

The court having seen and examined the petition for rehearing filed by the defendant-appellant herein and being duly advised in the premises now overrules said petition for rehearing.

The defendant-appellant having filed a motion for stay of mandate in the event the petition for rehearing was denied, said motion for stay of mandate is granted and the issuance of said mandate is hereby stayed for 30 days from and beyond the date of this order.

IT IS SO ORDERED.

# In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1587

NATHAN STEIN, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 437 F. 2d 775.

### JURISDICTION

The judgment of the court of appeals was entered on February 9, 1971 and a petition for rehearing was denied on March 2, 1971 (Pet. App. C). The petition for a writ of certiorari was filed on April 16, 1971, and is thus out of time. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).



425-819—71

## QUESTIONS PRESENTED

1. Whether sufficient evidence supports petitioner's conviction for wilfully attempting to evade income taxes for 1963.

2. Whether the trial court committed prejudicial error in permitting testimony concerning an event allegedly remote in time, in limiting the cross-examination of certain government witnesses, or in admitting in evidence a summary of petitioner's reconstructed income and tax liability.

3. Whether certain of the jury instructions were prejudicially erroneous.

## STATEMENT

Petitioner was indicted in two counts for wilfully attempting to evade his income tax for the years 1962 and 1963, in violation of Section 7201 of the Internal Revenue Code of 1954. After a jury trial, he was acquitted as to the 1962 count, and convicted as to the 1963 count. The court imposed a fine of $2,500 plus costs and a prison sentence of one year (App. 645–646).[1] The court of appeals affirmed in a comprehensive opinion (Pet. App. A).

Petitioner was engaged in the meat wholesale business in Indianapolis, Indiana (App. 165). He employed an accountant to keep his books and prepare his returns, both on a cash basis. The accountant worked only with figures supplied by petitioner, which he did not independently verify (App. 27–30, 35).

---

[1] "App." references are to the Appendix for Apellant in the court of appeals.

Revenue agents examined petitioner's books in 1964, and sought to reconstruct his income by the bank deposits method. For 1963, they found total deposits and cash expenditures of $394,668.11 (App. 636). The agents reviewed their figures with petitioner, and obtained his help in identifying all deposits that did not represent income items (*e.g.*, App. 129, 130, 134–139, 176, 232–234). All such non-income items were then thoroughly investigated (App. 175).

The non-income items totaled $18,428.12. This amount, along with petitioner's business expenses (cost of goods sold and operating expenses) and various exclusions, exemptions, and deductions, was subtracted from the total deposit and cash expenditure figure (App. 134, 255, 262, 636). The resultant amount, $40,545.13, was petitioner's reconstructed taxable income under the government's computations (App. 637–638). Petitioner reported on his 1963 return only $1,833.90 in taxable income, almost $39,000 less than the government's computations indicated (App. 262).

Petitioner advised the agents that he determined his business income from his sales invoices (App. 122). He reported various totals to his accountant, who then prepared his tax return without seeing the invoices (App. 122–123). The invoices were not available for inspection by the agents (App. 53); petitioner claimed that a fire in his office in April 1965 had destroyed them (App. 123, 164, 391).[2] Thus at trial there was

[2] Petitioner asserted that he offered the invoices to the agents, but that they had not examined them when the fire occurred (see Pet. App. A-2).

no direct evidence concerning petitioner's income. A former employee, Gerald Waterman, testified that in March or April of 1962 petitioner discussed his federal income taxes with him. According to Waterman, petitioner related that his earnings were quite good. In reply to Waterman's remark concerning the adverse tax consequences of this, petitioner stated that that did not worry him and that he would have no hesitancy, with the assistance of his accountant and attorneys, about "cheating the Government as well as I would cheat anybody else, which includes my help, my customers". (App. 206–209.)

The government rested on the basis of the bank deposits computation and Waterman's testimony. Petitioner testified in his own behalf, seeking to show that most of the understatement established by the government's computations resulted from additional non-income deposits and good faith errors (Pet. App. A–3). He also introduced a net worth computation of his income, under which taxable income for 1963 was approximately $4,000, rather than the more than $40,000 found by the government's bank deposits method (*ibid.*). Finally, he denied that the conversation about which Waterman testified took place (Pet. App. A–2).

## ARGUMENT

Petitioner's contentions turn on the particular facts of his case. They were carefully considered and rejected by the court below. There is no reason for further consideration by this Court.

1. Petitioner asserts that his conviction is not supported by sufficient evidence. He argues that the government's uncorroborated bank deposits computation

was not sufficient to show that he had unreported income for 1963 (Pet. 5–9); that there was insufficient evidence of wilfullness (Pet. 9–11); and that there was no evidence of where he filed his 1963 tax return (Pet. 11–13) or of how much tax he paid that year (Pet. 13).

The bank deposits method utilized by the government is a proper method of establishing unreported income. See *United States* v. *Frank,* 245 F. 2d 284, 287 (C.A. 3), certiorari denied, 355 U.S. 819; *United States* v. *Doyle,* 234 F. 2d 788 (C.A. 7), certiorari denied, 352 U.S. 893. That method was correctly applied here. Petitioner's claims that some non-income items were not deducted (Pet. 6) are without substance. His self-serving assertions concerning additional non-income items were matters for the jury. The government's proof made clear that every effort was made to identify and eliminate all of these items. While the government necessarily could not establish the exact income, it established a substantial amount of unreported income, which amply supports this element of petitioner's offense. See *Holland* v. *United States,* 348 U.S. 121, 138; *United States* v. *Johnson,* 319 U.S. 503, 517.[3]

[3] Petitioner's reference to the fact that the government's bank deposits showing was not corroborated (Pet. 6) is irrelevant. No such corroboration is required. See *Stinnett* v. *United States,* 173 F. 2d 129 (C.A. 4), certiorari denied, 337 U.S. 957; *Gleckman* v. *United States,* 80 F. 2d 394 (C.A. 8), certiorari denied, 297 U.S. 709. Moreover, petitioner himself provided corroboration in his purported reconstruction of his income by the net worth method. That method, after necessary adjustments, also showed a substantial amount (approximately $35,000) as petitioner's 1963 taxableincome (see App. 567–569, 636–643; Pet. App. A–5—A–7).

Similarly, sufficient evidence supports the jury's conclusion that petitioner wilfully sought to evade his taxes by not reporting all of his income. While the substantial amount of unreported income by itself indicated wilfullness, there was also direct proof of this in Waterman's testimony.

Petitioner's claim concerning where he filed his return is, contrary to his assertion (Pet. 13), only a challenge to the venue of his trial. Again, ample circumstantial evidence supports the jury's decision on this issue, as the court below held (Pet. App. A–7). Finally, while there was no proof of the taxes petitioner actually paid for 1963, this was not an element of the offense charged—evasion of the proper tax assessment. See *Sansone* v. *United States,* 380 U.S. 343, 354.

2. Petitioner's claims of procedural error in the conduct of the trial are all without merit. The testimony of the witness Waterman concerning his conversation with petitioner was plainly relevant to the case. The trial court correctly concluded that the conversation was not, as petitioner contends (Pet. 14–15), excludable because it was too remote. The conversation occurred in the spring of 1962, some nine months before the year in question and only two years before petitioner filed his 1963 return (App. 206–209). The trial court had broad discretion as to this matter, and there was no abuse of that discretion in admitting this testimony.[4] See *Mitchell* v. *United States,* 213 F.

[4] Petitioner's assertion (Pet. 22–25) that the government knowingly used "tainted testimony" of witness Waterman is simply not so. The government sought to buttress an already

2d 951, 958 (C.A. 9), certiorari denied, 348 U.S. 912.

Nor did the trial court unduly restrict the cross-examination of government witnesses, as petitioner charges (Pet. 15–17). The court sought only to limit the trial to matters arguably relevant. Indeed, much of the evidence that petitioner complains he was unable to elicit on cross-examination was developed in later direct testimony, when the same witness was called by the defense (App. 336–361, 363–365). The cross-examination of Waterman was largely unfettered, and the trial court did not exceed its discretion in those instances where it sustained government objections. See *United States* v. *Allegretti,* 340 F. 2d 254, 258 (C.A. 7), certiorari denied, 381 U.S. 911.

The court's admission of the government's summary of income as reconstructed by the bank deposits method (Govt. Ex. 44) was not improper, as petitioner states (Pet. 17–21). As discussed above, the bank deposits method utilized by the government was an appropriate means of establishing petitioner's actual income. See *Holland* v. *United States, supra,* 348 U.S. at 131–132. The government's summary of its computations was correctly proffered for consideration by the jury. See *United States* v. *Johnson, supra,* 319 U.S. at 519–520.

3. Petitioner's final assertion (Pet. 26–30) is that the trial court erred in instructing the jury that in its consideration of petitioner's reconstruction of his income by the net worth method, capital losses, if any, incurred by petitioner during 1963 should be added

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strong case against petitioner with testimony from Waterman which it believes was true; it was for the jury to decide whether or not it was.

to net worth. This was correct, since nondeductible items are added to actual net worth under this method. Cf. *Holland* v. *United States, supra,* 348 U.S. at 125. Moreover, the amount of such losses for 1963 ($514.93) was not significant to the government's case and thus, as the court below concluded, any error on this score would be nonprejudicial (Pet. App. A-8).

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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